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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 497

HANS ZIMMERMAN, PETITIONER

v.

DELOS C. EMMONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Earlier interlocutory decisions of the United States District Court for the District of Hawaii in these proceedings are reported *sub. nom. Zimmerman* v. *Poindexter, et al.*, at 74 F. Supp. 933 and 78 F. Supp. 421 (Pet. App. 1–6). The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 7–10, R. X 3–6)[1] is reported at 225 F. 2d 97.

[1] Since only Volumes II to VII of the record are paginated consecutively, references are made to volume (roman numeral) and pages (arabic numerals) of the certified record.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1955 (R. X 7). The petition for a writ of certiorari was filed on October 29, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Following a trial, petitioner's claim for damages was submitted to a jury under instructions of which some were requested by petitioner and of which none were objected to by him. He made no motion for a directed verdict or for judgment notwithstanding the verdict against him. The first question presented is whether, in these circumstances, petitioner could argue on appeal that he was entitled to judgment as a matter of law.

2. Whether the evidence was legally sufficient to sustain the jury's finding that respondent was not personally liable to petitioner for the consequences of official acts performed by him as Commanding General of the Hawaiian Department in carrying out his official military duties with respect to the defense of Hawaii during the first sixteen months of World War II.

STATEMENT

Following the Japanese attack on Pearl Harbor, on December 7, 1941, petitioner, a resident of Hawaii, was interned from December 8, 1941, to March 12, 1943. Claiming that respondent,

the Commanding General of the Hawaiian Department during most of this period, had exceeded his authority in retaining him in internment, petitioner filed his complaint in the instant case seeking to recover damages. Shortly before the trial was to begin, petitioner, on the basis of the pleadings and voluminous other papers, moved for summary judgment, which the district court denied on the ground that there were genuine issues of material fact. A trial lasting fifteen days was then had, and the case was submitted to the jury. Petitioner did not move for a directed verdict, nor did he object to any of the instructions given to the jury. After the jury found for respondent, petitioner moved for a new trial, which was denied. On appeal, the court below affirmed, holding that the various allegations of error had in several instances not been properly saved for appellate review and in any case were without merit.

The testimony given and presented by respondent—and believed by the jury, as evidenced by the verdict—may be summarized as follows:

1. The situation in Hawaii following the attack on Pearl Harbor

As the result of the surprise attack on Pearl Harbor, serious, if not crippling, injuries had been inflicted upon the Pacific fleet (R. III 421). In addition, the islands themselves were in an extremely precarious military situation. The lo-

cation of the Japanese fleet was unknown. The ground forces were inadequate to ward off an assault in strength upon Oahu, and there was practically no defense on the other islands (R. III 413). The Hawaiian Islands were of the utmost strategic importance; they constituted the most important bastion upon which the security of the West Coast depended; their capture by enemy forces would have interfered most seriously with the prosecution of the war (R. VII 2186–2187, 2192–2193). Until the latter half of 1943, Hawaii was considered a combat zone located in an active theatre of war (R. III 365, 534–536, VII 2185–2186). There were considerable enemy aerial and submarine activities in the islands during the first two years of the war, including shellings, bombings, and at least one sinking in the inter-island channels (R. VII 2189–2190).

While the military situation in Hawaii improved as the war progressed, the islands were still weak in April 1942 (R. III 486). Attacks in considerable strength could have been made upon them until the early part of 1943 (R. III 535–536), and raids by carriers and submarines as late as the spring of 1944 (R. III 536, VII 2193–2195, 2204–2205).

In these circumstances, it was of the utmost importance to prevent the leaking out to the enemy of any information concerning the damage

to the Pacific fleet (R. III 421),[2] the state of military preparedness on the Hawaiian Islands (*supra*, p. 4), and the presence of convoys and fighting vessels en route to other combat areas and of damaged ships returning from battle (R. III 458–459, VII 2190, 2205).

The tremendous task of keeping this information inviolate was complicated by the fact that virtually all of these activities took place in full view of the residents, and thus were common knowledge on the islands (R. III 377, 426). Consequently, this information could be picked up easily by espionage parties landing from submarines at night (R. III 459, VII 2206).

This intelligence problem constituted one of the reasons for an order of General Short, in command of the islands during the Pearl Harbor attack, pursuant to which all persons considered potentially dangerous were taken into custody (R. III 840–842).[3] The arrests were made on the basis of lists of persons considered dangerous for

[2] It is doubtful whether the United States would have succeeded at Midway had the Japanese been aware of the full damage they had inflicted upon the Navy at Pearl Harbor and realized the inadequacy of the forces that were opposing them (R. III 422).

[3] Respondent took over the duties of Commanding General of the Hawaiian Department and of Military Governor of the Territory of Hawaii on December 17, 1941 (R. II 220, 223). His duties included the defense of the Hawaiian Islands, and of all other islands in the Pacific garrisoned by Army troops. Internal security constituted a part of this responsibility. (R. III 402.)

the internal security compiled by the Army Intelligence (G–2), Office of Naval Intelligence (ONI), and the Federal Bureau of Investigation (FBI) (R. III 839–842).

2. Petitioner's detention and release

Petitioner, a naturalized American citizen of German descent, was taken into custody along with others on December 8, 1941, because he was listed by the FBI as a person to be apprehended in case of a war with Germany as a "potential dangerous pro-Nazi" (R. III 908).

On December 20, 1941, a Hearing Board consisting of two civilians (R. I 141, 153) examined the reasons for petitioner's detention (R. III 967). Petitioner was accorded the right of counsel (R. III 350) and the privilege to call witnesses (R. III 958). He availed himself of the latter privilege (R. III 959).[4] However, he was not present when an agent of the Federal Bureau of Investigation testified against him, and thus could not cross-examine him (R. III 973–975, IV 1011–1012).

On the basis of this hearing the Board found:

> 1. That the internee [petitioner] is a citizen of the United States.
>
> 2. That the evidence presented by the F. B. I. shows that the internee had pro-

[4] One of the character witnesses called by petitioner was the father of one of the Hearing Board members (R. III 958–959).

Axis leanings and at numerous times suggested that the greatness of Hitler would eventually make him the ruler of the world.

3. That the record of the F. B. I. shows the internee to have been active in interests inimical to the interests of the United States.

It recommended that petitioner be interned for the duration of the war (R. I 150, R. IV 1330). On February 16, 1942, a Reviewing Board consisting of the representatives of the three Intelligence Agencies, G–2, ONI and the FBI, concurred in the recommendations of the Hearing Board (R. I 152). The following day respondent, as the Military Governor of Hawaii (see *supra*, p. 5, fn. 3), ordered that petitioner be interned (R. I 152, R. II 221).[5]

In ordering petitioner's internment, respondent bore no malice toward petitioner (R. III 465). He reviewed petitioner's case together with some fifteen or twenty other proceedings (R. II 223),[6] relying largely on the recommendations of the Hearing Boards and of the Reviewing Boards (R. II 225–226, III 342–343). He had great confidence in the representatives of the security

[5] The order actually was signed by respondent's Executive Officer, Col. (later The Judge Advocate General) Green (R. I 152).

[6] Respondent was greatly concerned over the fact that a number of American citizens had been detained, and gave the review of those cases top priority (R. III 420).

agencies, especially Mr. Shivers, the local head of the F. B. I. (R. III 343), and felt that the concurrent recommendations of the Hearing Board and Reviewing Board to intern a person constituted "a fact that you can't laugh off" (R. II 297).

While respondent did not believe that petitioner was a spy, he was convinced that petitioner was potentially dangerous (R. II 232–234, 246, 298). In view of the tremendous risks at stake and of his personal responsibilities for the safety of the Nation, respondent was not, and could not be, taking any chances. By necessity, he used the term "potentially dangerous" in a very broad way (R. III 376), and leaned over backward in order to achieve as much security as possible (R. III 409). Respondent realized that very serious hardships may have been inflicted upon citizens and injustices may have been committed. He pointed out, however, that this was the result of military necessity and felt that relief might be given by special Act of Congress to those citizens as to whom it appeared that the internment was a mistake and unjustified (R. III 409).[7]

As pointed out, *supra*, p. 7, the formal order directing petitioner's internment was issued on

[7] Petitioner's actual loyalty is by no means established or conceded. Cf. Pet. 3, fn. 2, 7–8. The full text of the statement of respondent's counsel to which petitioner refers (R. II 39–43) shows plainly that he did not concede petitioner's loyalty (R. II 41), but merely that in his opinion the latter was not in issue, the true question being respond-

February 17, 1942. On February 19, 1941, petitioner's wife filed a petition for a writ of habeas corpus in the United States District Court in Hawaii. The following day the court denied the writ by reason of the Military Governor's General Order No. 57 of January 27, 1942, which prohibited the issuance of the writ (R. II 281–282).[8]

Respondent explained at the trial that the suspension of the writ of habeas corpus was continued only in order to protect the islands (R. II 271) and for security reasons (R. II 286).[9] At the time the habeas corpus proceedings in this case were instituted, less than three months after the Pearl Harbor attack, the Hawaiian Islands were an active combat zone, subject to sporadic shellings and bombings (*supra,* p. 4), and the respondent bore the ultimate responsibility for their military and internal security. In this capacity he had access to much secret and stra-

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ent's good faith in carrying out his responsibilities. Respondent did not admit that the treatment given petitioner caused hardship and damage or that it was a mistake. He merely stated that hardships could have been inflicted upon innocent persons, and that mistakes may have been made in *some* cases. R. III 409–410, quoting Emmons' deposition, p. 82.

[8] While the court stated that the writ would have issued as a matter of course but for General Order No. 57 (R. II 281), it did not and, of course, in the absence of a hearing, could not state whether it would have ordered petitioner's release (cf. Pet. 11–12, fn. 10).

[9] The writ had originally been suspended on December 7, 1941, with the approval of the President. See *Ex parte Zimmerman,* 132 F. 2d 442, 444 (C. A. 9).

tegic information which by necessity was not available to the courts.

Immediately after the denial of the writ of habeas corpus, petitioner, together with a group of other internees, was transferred from the internment camp at Sand Island, in Honolulu Harbor, to Camp McCoy, Wisconsin (R. II 287–290, III 434–435). The purpose of this action was not to moot the habeas corpus proceedings (R. III 437–438); two months later petitioner was returned to the jurisdiction of Hawaiian courts and of the United States Court of Appeals for the Ninth Circuit (see *infra*). As respondent pointed out, the motives for the transfer were the inconvenient location of the camp, potential crowding, the food problem on the islands, and similar technical considerations (R. III 434–435, IV 1419). Once petitioner and his fellow internees were on the mainland, it developed, however, that they might be freed by writs of habeas corpus. Respondent decided that in view of the vital nature of the information held by the internees and of the importance of preventing its dissemination, their release on the mainland would be extremely dangerous. He therefore ordered the return of the internees, including petitioner, to Sand Island (R. II 296, III 501), where they remained until released.[10]

[10] The food at Sand Island was good and the internees were housed as well, if not better, than soldiers (R. II 301, IV 1385–1408). The camp was inspected by the Interna-

Meanwhile, petitioner appealed the denial of the writ of habeas corpus to the Court of Appeals for the Ninth Circuit, which affirmed on December 14, 1942. *Ex parte Zimmerman,* 132 F. 2d 442. A petition for a writ of certiorari, filed on March 13, 1943, was denied as moot, because petitioner had been removed from Hawaii on March 3, 1943, and released on the mainland on or about March 12, 1943 (319 U. S. 744; see also the Government's Memorandum suggesting mootness in *Zimmerman* v. *Walker*, No. 823, October Term, 1942).[11]

As pointed out, *supra,* p. 7, fn. 6, respondent was deeply concerned about the internment of American citizens. Accordingly, he directed that their files be reviewed periodically in order to determine whether the internees could be released safely (R. III 453–454).[12] In the early part of 1943, respondent felt that the military situation had changed to such an extent that information known to petitioner

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tional Red Cross, which certified that "the camp is the most excellent from all viewpoints," and that "All the internees are unanimous in affirming that the authorities treat them well and they express only praise and sentiments of respect for the commander of the camp. We wish also to stress again the cleanliness in the superb sanitary installations and also the beautiful kitchens in the camp" (R. VI 2000–2003).

[11] So far as we are aware, petitioner at no time sought bail or release on bond from any Justice of this Court. See Rule 45 of the former Rules of this Court on "Custody of prisoners pending a review of proceedings in habeas corpus."

[12] Petitioner's case was reviewed in June 1942, but he was rejected for parole at that time (R. III 685, 688).

as well as to some 200 other internees had lost its strategic value, and that it had become safe to release petitioner on the mainland (R. III 381, 386, 522).[13] Therefore, a formal order directing petitioner's release was issued on February 11, 1943 (R. II 305, III 702).[14] The actual decision to release petitioner had been made somewhat earlier (R. III 489, 492). As far as respondent was concerned, petitioner's release was motivated solely by considerations of security (R. II 305, 328–329); it was his firm conviction that he could not compromise his duties with respect to security on the basis of speculations as to what the courts might do in the future (R. III 444).

3. The proceedings below

After the termination of hostilities, petitioner instituted this civil damage action for false imprisonment, deprivation of earning power, and defamation of character against many of the officials connected with his imprisonment. The complaint named as defendants Joseph B. Poindexter, Governor of the Territory of Hawaii on December 7, 1941, General Walter C. Short, Command-

[13] The time was not deemed ripe in September 1942 (cf. R. III 492–493).

[14] The release might have been ordered earlier had it not been for the presence of a large number of warships in Honolulu (R. III 385).

ing General of the Hawaiian Department on December 7, 1941, the respondent, General Delos C. Emmons, General Thomas H. Green and General William R. C. Morrison (colonels at the time of the events in question), who had been executive officers to the Military Governor, I. H. Mayfield, George W. Bicknell, and Robert L. Shivers, members of the Reviewing Board, and Frank Thompson, Jr. and Joseph J. Kelley, members of the Hearing Board which had recommended petitioner's internment.

Since respondent was not a resident of Hawaii, petitioner could not obtain service on him. He brought actions against him in the District of Columbia and West Virginia, which aborted because respondent was not a resident of those jurisdictions either. Service finally was effected on respondent in an action brought in California, respondent's actual residence. (Pet. 27.) Petitioner, however, was desirous that respondent be a party to the Honolulu trial. In order to accommodate petitioner, respondent agreed to submit to the jurisdiction of the District Court for the Territory of Hawaii in consideration of petitioner's promise that he would not make any attempt to take out execution and to make collection until all appeals had been exhausted, and until a reasonable period had expired to enable respondent to attempt the passage of a private bill pro-

viding for the payment of any judgment which petitioner might recover (R. IX 2).[15]

On November 30, 1950, on the eve of the trial, which opened on December 5, 1950,[16] petitioner moved for summary judgment on the basis of the pleadings and of hundreds of pages of depositions, requests for admissions and answers thereto, exhibits, and memoranda of law (R. I 156–157, 1B–1C). The court denied the motion (R. II 54–58, VII 2165).

The trial before a jury lasted from December 5, 1950, to December 20, 1950. The transcript of the proceedings numbers more than 2,300 pages (R. VII). At the very end of the trial petitioner filed a third amended complaint, dismissing the proceedings against all defendants except respondent (R. I 176). The jury rendered its verdict in favor of respondent (R. I 186). Petitioner did not move for a directed verdict, did not object to the court's charge to the jury,[17] and did not move for a judgment notwithstanding the

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[15] During the trial petitioner's counsel assured respondent "it is not intended to get any money out of you" (R. III 411).

[16] By that time, the District Judge specially designated to hold court, respondent, his counsel, and even some of petitioner's counsel had proceeded to Hawaii from the mainland.

[17] R. VII 2257. "Mr. Wirin [petitioner's counsel]: 'Yes. Secondly, we intend to file no exceptions to the court's charge. The plaintiff has spent all his money and can't appeal, anyway. Anyway, we do not intend to file any exceptions'."

verdict. He did, however, move unsuccessfully for a new trial (R. I 200–220, 222).

On appeal, petitioner urged as error the denial of his motion for summary judgment, the exclusion of evidence referring to the agreement that petitioner would not seek enforcement of a judgment without giving respondent a reasonable opportunity to obtain a private act of Congress,[18] the giving, and refusal to give, of certain instructions, and the denial of the motion for a new trial. He also urged that the verdict was contrary to, and not supported by, the evidence, and that there had been "moral coercion of the jury" (Pet. App. 7–10).

The Court of Appeals affirmed. It held that there had been issues of fact precluding the granting of summary judgment, that petitioner had not complied with the rules requiring the specification of errors concerning the admission and exclusion of evidence and objections to the charge, and that in any event the pertinent assignments of error were without merit; that the contention that the verdict was against the weight of the evidence could not be considered in the absence of a motion for a directed verdict; and that no abuse of discretion had been shown in the denial of the motion for a new trial (Pet. App. 7–10).

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[18] Petitioner had agreed in substance with the court's instruction to the jury to disregard all evidence concerning this agreement (R. VII 2218–2227).

ARGUMENT

Under instructions probably unduly favorable to petitioner, and never objected to by him, the jury returned a verdict absolving respondent of personal liability in damages. By this verdict, it is conclusively settled that respondent acted reasonably and without personal malice, under a Presidentially approved declaration of martial law, and under the pressure of exigent military necessity.[19] In the discussion which follows, we note first of all the dispositive fact that petitioner, in addition to accepting the instructions to the jury as correct, never moved for a directed verdict or for judgment notwithstanding the verdict, so that his effort on appeal to overturn the verdict as contrary to law must be rejected at the outset. We then summarize the settled principles which would, in any event, require rejection on the merits of petitioner's attempt to hold respondent personally liable for the wartime action under his military command of which petitioner complained. Both points—the conclusiveness of the verdict as a basic matter of procedure and the substantive fallacy in petitioner's claim even if it were open

[19] Since petitioner has been free for more than twelve years (see *supra*, pp. 11–12), the case does not raise any question as to whether petitioner should be released from confinement. Nor does the case involve the validity of the suspension of the writ of habeas corpus; the jury was expressly instructed that the suspension of the writ did not render inoperative petitioner's constitutional rights (R. VII 2322–2323).

here—demonstrate the absence of grounds for certiorari.

1. Petitioner attempts here, on a version of the facts different from those established by the jury's verdict, to argue that he was entitled to damages as a matter of law. However, under settled limitations on appellate review of jury verdicts which have their source in the Seventh Amendment, it is clear that the legal sufficiency of the evidence is not open for review. For this question may be raised on appeal only where there has been a motion for a directed verdict, presenting the question whether the case may properly go to the jury, or some objection to instructions or a legal ruling which poses in the trial court and preserves for appeal an issue of law.[20] Petitioner took no such action. Accordingly, his effort on appeal to overturn the verdict on the ground that there was no question for the jury—contrary to the instructions given at his request, which presented such questions (*infra*, p. 18)—was properly rejected by the court below. As that court correctly held (Pet. App. 10), the failure to move for a directed verdict could not be

[20] Rule 50, Federal Rules of Civil Procedure; *Woodbridge* v. *Dupont*, 133 F. 2d 904 (C. A. 2); *Flint* v. *Youngstown Sheet & Tube Co.*, 143 F. 2d 923, 924 (C. A. 2); *Harriman* v. *Midland Steamship Line, Inc.*, 208 F. 2d 564 (C. A. 2); *Home Ins. Co. of New York* v. *Davila*, 212 F. 2d 731, 733 (C. A. 1); Moore, *Federal Practice* (2d Ed.), Vol. 5, Section 50.05 [1].

cured by petitioner's attempt to raise the issues thus foreclosed by appealing from the denial of his motion for a new trial.[21]

Similarly unavailing is petitioner's effort (see Pet. 8–9, 16–17) to achieve the same result by arguing that it was error to deny his motion for summary judgment. Both courts below were correct in holding that petitioner had not met the burden of showing that the hundreds of pages of pleadings, depositions, admissions, exhibits, and memoranda attached to the motion for summary judgment did not raise genuine issues of material fact. That such issues existed is evident from petitioner's own requests for instructions to the jury (Nos. 21 and 22, R. I. 266, 267), which recognized the materiality of the vigorously contested issues whether respondent had acted unreasonably or arbitrarily in the circumstances and whether his acts were justified by military necessity.[22]

2. On its merits, assuming *arguendo* that they could be considered here, the jury's verdict deny-

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[21] See cases cited *supra*, fn. 20. Petitioner apparently claims now (Pet. 17) that his Request for Instructions to the Jury No. 13 (R. I 256) constitutes the equivalent of a motion for a directed verdict. This request, hidden as it was among some twenty pages of other requests plainly recognizing the presence of issues of fact, is not the equivalent of the express motion required by the Rules. Moreover, the request was not granted, and petitioner made no objection to the charge as given (*supra*, p. 14).

[22] Although he expressly waived any objections to the charge (*supra*, p. 14, fn. 17), and apparently presents no

ing petitioner's claim is correct. For there is ample evidence in the record to support the jury's conclusion that respondent acted reasonably and without malice to petitioner; that he took the actions he did solely in an effort to discharge, to his best ability, his overwhelming responsibility to protect the security of this country from threatened enemy invasion; and that these actions were required by the exigencies of the situation. And it is clear, under settled principles, that respondent could not be called upon to respond personally in damages for the allegedly improper actions performed under his command.

The courts have recognized as a matter of overriding public policy that public officials "shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits." [23] The fear that potential personal liability would paralyze official action is by no means imaginary. This Court only recently recalled the notable incident of the Great

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question for review on the charge (see Pet. 2–3), petitioner includes in his argument some attacks on the instructions to the jury (Pet. 17, 27–28). These fatally tardy contentions are obviously precluded. Rule 51, Federal Rules of Civil Procedures; *New York, N. H. & H. R. Co.* v. *Zermani*, 200 F. 2d 240, 245 (C. A. 1), certiorari denied, 345 U. S. 917; Moore, *Federal Practice* (2d Ed.), Vol. 5, par. 51.04; Barron & Holtzoff, *Federal Practice and Procedure*, Vol. 2, § 1103.

[23] Mr. Justice Jackson, dissenting in *Dalehite* v. *United States*, 346 U. S. 15, 59.

Fire of London of 1666 in which one-half of the City was destroyed because the Lord Mayor, for fear he might be answerable in trespass, refused to give the instructions necessary to contain the fire.[24] Far graver considerations of national safety argue here against a decision which would subject respondent to personal liability in damages for the acts he committed while he was charged with the responsibility for the defense of Hawaii and of the West Coast (*supra,* pp. 3–5). Only the most resolute or the most irresponsible could discharge their duties in such circumstances.[25]

In view of these considerations, it is well settled that an executive official of the Government, regardless of his motives, is not personally liable for an act which is within the general scope of his official authority. *Spalding* v. *Vilas,* 161 U. S. 483, 498. This rule of complete immunity of executive officials from individual damage suits for any action within the general scope of their authority has been applied to cabinet officers (*Spalding* v. *Vilas, supra; Standard Nut Margarine Co.* v. *Mellon,* 72 F. 2d 557 (C. A. D. C.), certiorari denied, 293 U. S. 605; *Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949); the Comptroller of the Currency,

[24] *United States* v. *Caltex, Inc.*, 344 U. S. 149, 155, fn. 7; and see *Respublica* v. *Sparhawk*, 1 Dall. 357, 363.

[25] Cf. Learned Hand, J., in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C. A. 2), certiorari denied, 339 U. S. 949.

a United States Attorney and his Assistant (*Cooper* v. *O'Connor,* 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643); a member of the Securities and Exchange Commission (*Jones* v. *Kennedy,* 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665); Army officers (*Burns* v. *Spiller,* 161 F. 2d 377 (C. A. D. C.), certiorari denied, 332 U. S. 792); and to many other classes of federal officers (see *e. g., Yaselli* v. *Goff,* 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503; *Lang* v. *Wood,* 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; *Adams* v. *Home Owners' Loan Corp.,* 107 F. 2d 139 (C. A. 8); *Gibson* v. *Reynolds,* 172 F. 2d 95 (C. A. 8), certiorari denied, 337 U. S. 925; *Dodez* v. *Weygandt,* 173 F. 2d 965 (C. A. 6); *DeArnaud* v. *Ainsworth,* 24 App. D. C. 167; *Phelps* v. *Dawson,* 97 F. 2d 339 (C. A. 8); *Papagianakis* v. *The Steamship Samos,* 186 F. 2d 257 (C. A. 4), certiorari denied, 341 U. S. 921).

Gregoire v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949, involved facts almost identical to those here. Gregoire was interned as an alien enemy during World War II. In contrast to petitioner, who was freed voluntarily after 16 months (see *supra,* pp. 11–12), Gregoire regained his freedom by writ of habeas corpus only after nearly five years of detention (*United States* v. *Watkins,* 164 F. 2d 137 (C. A. 2). The very court which ordered Gregoire's release, however, held that he was not entitled to re-

cover damages from the officials responsible for his imprisonment. In his opinion for the court, Chief Judge Learned Hand, after carefully weighing the countervailing considerations between the citizen injured by possibly illegal official action and the public official who would have to perform his duties subject to "the constant dread of retaliation," struck the balance in favor of the latter.[26] He said (177 F. 2d at 581):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put

[26] See also *Cooper* v. *O'Connor*, 99 F. 2d 135, 141–142 (C. A. D. C.), certiorari denied, 305 U. S. 643.

to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books.

The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for

any of the purposes on whose account it was vested in him.

Here, the case against personal liability is even clearer than the foregoing principles require. Under instructions which were more favorable to petitioner than the controlling precedents, the jury was left to examine respondent's motives for official actions under his command (R. VII 2275) and was even permitted to reexamine the military necessity for these actions, on the theory that only such necessity would prevent personal liability (R. VII 2271). There is therefore no possible basis in law for petitioner's claim that the verdict denying recovery should now be set aside.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1955.

No. 497

HANS ZIMMERMAN,

Petitioner,

vs.

DELOS C. EMMONS.

Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari.

"ONCE PETITIONER AND HIS FELLOW INTERNEES WERE ON THE MAINLAND, IT DEVELOPED, HOWEVER, THAT THEY MIGHT BE FREED BY WRITS OF HABEAS CORPUS. RESPONDENT DECIDED THAT IN VIEW OF THE VITAL NATURE OF THE INFORMATION HELD BY THE INTERNEES AND OF THE IMPORTANCE OF PREVENTING ITS DISSEMINATION, THEIR RELEASE ON THE MAINLAND WOULD BE EXTREMELY DANGEROUS. HE THEREFORE ORDERED THE RETURN OF THE INTERNEES, INCLUDING PETITIONER, TO SAND ISLAND [R. II 296, III 501], WHERE THEY REMAINED UNTIL RELEASED."

The above quotation is not that of petitioner, nor is it taken from petitioner's argument, nor is it petitioner's version of the facts. This statement of respondent's usurpation of power is that of respondent himself in this court at page 10 of his Brief in Opposition!

We submit that were there nothing else in this case—no problem of due process concerning a fair hearing and an opportunity to know at least something of the charges against petitioner and an opportunity to meet them—this statement by respondent shows on its face the abuse of authority exercised by him and is, in and of itself, compelling reason why this court should grant the petition and decide whether such flaunting of the civil authorities can be tolerated.

This statement by respondent demonstrates more clearly, because it is that of respondent, how he acted as ruler, judge, prosecutor; in short, how he ignored the Constitution. It states more eloquently than could petitioner how respondent, patently and concededly, disregard the fundamental principle of our nation as to the supremacy of the civil over the military. This court has spoken on this in many cases, from which the following are but two excerpts.

Dow v. Johnson, 100 U. S. 169, 25 L. Ed. 632, 636:

> "We fully agree in the doctrine . . . that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend of the Republic who advocates the contrary. The established principle of every free people is, that the law alone shall govern; and to it the military must always yield."

Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed. 281, 295:

> "Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and devisive measures to accomplish ends deemed just

> and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

The statement by respondent proves without peradventure of doubt, that which petitioner thought was clear all along, respondent's unwillingness to trust to the courts to sustain his power where necessary (*Korematsu v. United States,* 323 U. S. 214), because he knew that where not necessary, the courts would not sustain him (*Ex parte Endo,* 325 U. S. 273). But respondent was not willing to act pursuant to law or the Constitution. By his admitted conduct, respondent proved the validity of Louis Smith's statement in his book, *American Democracy and Military Power,* Univ. of Chicago Press, 1951, page 274, where he said:

> "(T)he military have a notorious penchant for . . . making it (martial rule) more severe than might be necessary, and for perpetuating the condition beyond what is strictly justified."

As stated, we believe that nothing more than respondent's statement quoted above is necessary for this court to see the need for granting the petition. For the sake of completeness, however, we turn to, and answer, respondent's argument.

Preliminary Statement.

It is noteworthy that respondent's brief seeks to avoid the central issues raised in the petition. The most perfunctory treatment (Br. 18, ½ page) is given petitioner's claim that the motion for summary judgment should have been granted. Not even the questions presented in the government's brief (Br. 2) are these presented to this court by the petition (pp. 2 and 3). No direct challenge is made to petitioner's factual claims, all made and established at the motion for summary judgment. For example, that the purpose of petitioner's release on the mainland in 1943 was to moot the previous case before this court (Pet. 14-16).

Respondent suggests that his motivation was solely by considerations of security (Br. 12). But this is clearly negated by the fact that the security people, especially Mr. Shivers (in whom respondent had great confidence (Br. 7, 8)), were not even consulted [Shivers Dep. 204, 212, 213; Bicknell Dep. 112; C. T. 136], they had no part in it [Bicknell Dep. 64, 74, 76, 79, 80, 82, 111], and the release had nothing to do with security [Bicknell Dep. 91] and is emphasized by the fact that Dr. Zimmerman was the only person so released at that time (Pet. App. F, pp. 44-46).

I.

There Are No Procedural Reasons Why This Case Is Not Open to Review.

(Reply to Respondent's Point I, pp. 17-18.)

Respondent is quite in error when he asserts (Br. 2, 3, 14, 16, 17) that petitioner did not object to the instructions and that he made no motion for directed verdict.

A brief glance at the Clerk's Transcript [Vol. I of Record as certified to this court, herein designated as C. T.] from pages 279-295 shows that petitioner objected for 16 pages to the instructions proposed by respondent in addition to proposing his own instructions for some 34 pages [C. T. 239-274], to which respondent also filed objections [C. T. 275-277].

Moreover, that the trial judge knew exactly the position of the parties and neither expected, nor wanted, further objections is seen from the Reporter's Transcript:

R. T. 2036, 2037:

> "The Court: Yes. Now, there is one further matter before we leave. Neither side interposed their objections in regard to the requests for instructions of the other side, and my rule is that you should do that.
>
> Colonel Hughes: You mean itemize each request?
>
> The Court: No. Then you won't have to go into an argument. But I think the record should show just what the objection is in writing, just as we do down in the Southern District of California. That saves a great deal of time, and saves argument.
>
> Mr. Wirin: Yes, we will do that.

> The Court: And I can pass on them seriatim, without hearing any argument at all, because I know generally the line of instructions I am going to give. All I want to know is why the opponent to the one who makes the request objects."

Again, at R. T. 2364, the court said:

> ". . . when the court finally considered all of the objections of the respective parties it formulated its charge to the jury . . ."

Apparently respondent claims (Br. 14, f.n. 17; Br. 18, f.n. 21), because no formal exceptions repeating petitioner's objections to the instructions and repeating his requests for his own instructions were made, that this somehow means that petitioner cannot be heard to complain here on constitutional grounds. This argument disregards not only the procedure the trial court wanted followed [see quotes from R. T., above], but also is contrary to law. As pointed out at 2 *Baron & Holtzhoff*, Sec. 1104, page 810:

> ". . . Rule 51 is not top-heavy with technical excuses for overlooking trial court errors. After all only those errors are waived which might have been corrected had the proper objection or request been made. If the trial court is fully informed of the specific ground of objection or request, there is no need for repetition (citations). Few judges are aided by frequent repetition of objections which have once been overruled (citations)."

And again, 2 *Baron & Holtzhoff*, Sec. 1103, page 797:

> "A negative reply, however, to the court's query whether, apart from the preserved objections to rulings on the requests to charge, there was any excep-

tion to the charge, does not waive objections previously made to the refusal to give a requested instruction (citations)."

Furthermore, respondent overlooks the fact that exceptions to the charge are no longer required. As stated in 2 B & H, Sec. 1103, page 797:

> "Under Rule 46 exceptions to the giving or the failure to give an instruction are no longer required. An objection stating distinctly the objectionable matter and the grounds for objection is sufficient (citations). This conclusion is rested on Rule 8 of the general rules of the Supreme Court which is referred to in the Advisory Committee's notes as one of the sources of this rule and which before the promulgation of these rules, required specific exceptions to be taken to the charge. It would be strange indeed if the court, having abolished exceptions and bills of exceptions in all other instances, should require exceptions to instructions to which adequate objections had already been entered."

As to respondent's contention that no motion for directed verdict was made, this again is error as was pointed out by petitioner in his Petition (p. 9, f.n. 8). Respondent's suggestion that because petitioner's requested instruction [No. 13; R. T. 256] was one of a number requested by him, the request was somehow not made, is, to say the least, a peculiar argument, to say nothing of doing a great disservice to the trial judge. If petitioner was not moving the court for a directed verdict when he asked for the following instruction [R. T. 256]:

> "You are instructed that the detention of the plaintiff by the defendant, or under his orders, as Military Governor or as Commanding General, is illegal.

> "You are further instructed to award damages to the plaintiff for all losses suffered by him resulting from said detention, in accordance with the instruction on damages which the Court will give you,"

then language has no meaning.

The fact that the jury found against petitioner is no ground, as claimed by respondent (Br. 17) why the facts in the record on constitutional deprivation cannot be considered by this court. Indeed, as the cases pointed out by petitioner in his Petition (p. 18, f.n. 15) hold, the "facts" determinative of the denial of constitutional right in this kind of a case "are the very issues to review which this court sits." See also *Merchants National Bank v. City of Richmond,* 256 U. S. 635, 638; *Carlson v Curtiss,* 234 U. S. 103, 106; *Brooklyn Bank v. O'Neil,* 324 U. S. 697, 703; *Kern-Limerick, Inc. v. Scurlock,* 347 U. S. 110, 121; *Hoover & Allison Co. v. Evatt,* 324 U. S. 652, 659; *Pierre v. Louisiana,* 306 U. S. 354, 358; *Creswell v. Knights of Pythias,* 225 U. S. 246, 261-262.

Moreover, the facts relied upon by the petitioner were those adduced on the motion for summary judgment and not denied by respondent (Pet. 9-10).

And as to the motion for summary judgment, respondent has yet to point out what facts were in dispute. It is to be remembered that the motion was partial only (see Rule 56(d), F.R.C.P.), *i.e.,* on the issue of liability, not damages, and respondent himself has never denied the showing made on the motion. The suggestion (Br. 18) that there were issues *re* reasonableness and arbitrariness and justification by reason of military necessity fall flat if for no other reason that his admission both in his deposition and more forcefully here, that he ordered petitioner

back from the mainland in order to abort the judicial process of the United States. How can respondent claim this was anything other than unreasonable and arbitrary? And how can respondent, in view of the many decisions of this court claim that it was a question of fact as to whether he had the right to flaunt the open, functioning courts on the mainland? The suggestion that because, after his motion for summary judgment, petitioner requested instructions covering all contingencies calls for strange conduct on the part of a lawyer who has had a motion denied or an objection overruled.

II.

Petitioner Was Denied Due Process.

(Reply to Respondent's Point II, pp. 18-24.)

As pointed out by the petitioner, there are two grounds why this is the case here. The one is the denial to petitioner of anything resembling a fair hearing at least some time. The other is the blatant and starkly admitted (Resp. Br. 10) deprivation by respondent of petitioner's right to petition the courts on the mainland. Respondent chose not to reply to either of these issues, but relies on a theory of immunity from suit, a theory which, properly, neither court below accepted. Indeed the decision by the trial courts on the question (Pet. Appx. 1-6) is a complete answer to respondent's argument. Respondent ignores the many decisions of this court (see Pet. p. 5, f.n. 4) upholding the right of recovery in a case such as this. His chief reliance for support is *Gregoire v. Biddle,* 177 F. 2d 579 (C.A. D.C.) cert. den., 339 U. S. 949 and *Spalding v. Vilas,* 161 U. S. 483, neither of which applies.

In the first place the harsh doctrine of *Gregoire v. Biddle,* if it is to be followed at all, should be limited to the facts of that case, where two of the defendants were cabinet officers and the court followed the theory of immunity which has grown up as to such persons, and then equated the other defendants with the cabinet officers because they were acting under their direction. But as the cases previously cited by petitioner (Pet. p. 5, f.n. 4) demonstrate, this theory has never been applied to military officers who deprived citizens of constitutional rights, even though they acted reasonably and without malice.

In addition to those cases, this court has rendered many other decisions upholding the right to damages in a case such as this and there is abundant literature on the subject to the same effect.[1]

Aside from the fact that *Gregoire* is a Court of Appeals case and cannot, certainly, prevail in the face of the many decisions of this court to the contrary, we have examined the briefs in the case and note that none of the cases cited by petitioner both here (*supra,* f.n. 1) and in his Petition (p. 5, f.n. 4) were called to the attention of the court. Whether, had this been done, a different result would have obtained is, of course, conjecture. How-

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[1]*Tracy v. Swartout,* 10 Pet. U. S. 80; *Mitchell v. Harmony,* 13 How. U. S. 115; *Cammeyer v. Newton,* 94 U. S. 225; *Kilbourn v. Thompson,* 103 U. S. 168; *Poindexter v. Greenhow,* 114 U. S. 270; *Belknap v. Schild,* 161 U. S. 10; *Bell v. Hood,* 327 U. S. 678. The literature on this subject is voluminous. For a few examples, see 43 Am. Jur., Public Officers, 84 and 89 citing cases in footnotes 6 and 1, respectively; 135 A. L. R. 10-50, especially pp. 21-23 and 29-31; 54 Am. Jur., United States, 637-639; notes in 28 St. Johns Law Review 265, 9 Oh. S. L. J. 712 and 38 Mich. L. R. 1344. See also article by David in 12 S. C. L. R. 127 at 152 entitled Tort Liability of Public Officers, and by Jennings in 21 Minn. L. R. 263 entitled Tort Liability of Administrative Officers.

ever, we do point out that in granting to the Director of the Alien Enemy Control Unit the same immunity from suit as the Attorney General, it is clear that the *Gregoire* case is directly contrary to this court's decision in *Kilbourn v. Thompson,* 103 U. S. 168 where the members of the House of Representatives were accorded immunity, but the Sergeant-at-Arms of the House, who executed the House's order, was not.

Spalding v. Vilas, 161 U. S. 483, also relied on by respondent (Br. 20), is not apposite here. That is a case upholding immunity of a cabinet officer, an entirely different thing, as the cases show, than a military officer. Moreover, in that case, this court pointed out that there the defendant "did not exceed his authority, nor pass the line of his duty as Postmaster General" (161 U. S. 499). This is not the case here, where just the contrary is true. Under no conceivable theory did respondent have the authority or duty to snatch petitioner away from the mainland and transport him over the seas to abort the processes of the courts.

Respondent's argument (Br. 19-24) that the doctrine of immunity accorded to cabinet officers should be extended to cover military officers in order that they may feel free to violate the constitutional rights of those within their power is not only contrary to the decisions of this court, but, as history has shown, is not a valid or practical consideration because of the practice of Congress to pay or reimburse such damages (Pet. p. 28, f.n. 26).

Moreover, in contrast to the Lord Mayor of London example (Resp. Br. 20) is the long line of English precedents establishing the right to damages in a case such as

this, the most famous of which is that of John Wilkes (see Chaffee, *Free Speech in the United States,* pp. 243-244).

In effect, respondent is suggesting that *Mitchell v. Harmony,* 13 How. (U. S.) 115, and the other cases cited by petitioner (Pet. p. 5, f.n. 4; f.n. 1, *supra,* herein) should no longer be the law. Surely, if this court is prepared to overrule those cases, it should do so only after a grant of certiorari.

In any event, the extent of the personal liability of a military officer, or that he is not liable at all, is a substantial question that requires the grant of certiorari.

A. Respondent Is Liable for Removing Petitioner From the Mainland to Frustrate the Judicial Process.

We believe almost enough has been said by petitioner, as well as respondent (Br. 10), to make clear the need for the granting of the petition here. We refer, however, to this court's recent decision in *United States ex rel. Toth v. Quarles,* ..... U. S. ....., 24 Law Week 4005, Nov. 7, 1955, which was decided after the petition here was filed.

It is significant that in that case the trial court ordered Toth discharged on the ground that he should not have been carried off to Korea from the United States for trial without a hearing (113 F. Supp. 330; 114 F. Supp. 468). The parallel between that case and the case at bar is obvious. Indeed, petitioner's treatment was worse. Toth, at least, was carried back for trial where he would receive due process. Petitioner was carried off solely to be incarcerated.

But there is also significant language in this court's opinion which further demonstrates how unconstitutional was respondent's conduct. Thus this court said that:

> "Unlike courts, it is the primary business of armies and navies to fight or to be ready to fight . . ."

This, then, was respondent's primary task, not to abort the civil courts and reach his hand out to a jurisdiction not his.

Moreover, said this court, even in the exercise by the military of its admitted authority, it must be limited to "the least possible power adequate to the end proposed." It cannot be said that respondent thus understood or administered his power. While it may have been proper to incarcerate petitioner at the very beginning or even to exclude petitioner, as he did, from his command, his power ceased there, and he was required to yield, not usurp, the civilian control which had been set up to meet the problem.

Thus respondent set himself above Executive Order 9066 (7 Fed. Reg. 1407) and the Act of March 21, 1942 (56 Stat. 173), under which petitioner, on the mainland where he was, could have been excluded from, or kept in any area the military there felt necessary to guard against espionage and sabotage (*Korematsu v. United States,* 323 U. S. 214; *Hirabayashi v. United States,* 320 U. S. 81). Nor did respondent trust to the courts to assure that disloyal persons were not permitted at large. In *Ex parte Endo,* 323 U. S. 283, 302, this court said:

> "A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not a race, creed or color. He who is loyal is by definition not a spy or a sabo-

> teur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."

It would seem from this to follow that a person other than one like Endo could be detained, but in so doing, the civilian power of government would decide that question, and we would suppose, in accordance with a hearing affording a minimum of due process. In other words, Congress was fully cognizant of the problem facing this nation and its military generals. It decided to meet these problems by civilian authority, at least on the mainland. Respondent would not, and did not, permit Congress' will to be followed.

This is especially noteworthy in view of respondent's own statement [Emmons Dep. 31] that petitioner was "not potentially dangerous if in the United States." (*Cf.* respondent's assertion (Br. 8) that the reason he ordered petitioner's internment was that he was "potentially dangerous," whatever that may mean.) And contrast this with respondent's statement now (Br. 10) that "in view of the vital nature of the information held by the internees and of the importance of preventing its dissemination" on the mainland, *he decided* to and did order petitioner's return to Hawaii. Aside from the plain usurpation of judicial power by respondent, there is no basis in the record for this assertion as to Dr. Zimmerman. There is no claim that Dr. Zimmerman had been near Pearl Harbor or knew anything about the nature or extent of the losses.

B. Petitioner Was Entitled to a Hearing Which Afforded Due Process, for the Denial of Which Respondent Is Liable in Damages.

Even conceding *arguendo,* that respondent had the right to incarcerate petitioner at the beginning for a short time (*Cf. Moyer v. Peabody,* 212 U. S. 78, 85), and passing by respondent's patent unconstitutional conduct in snatching petitioner from the mainland to avoid the courts, nevertheless at some time before his banishment, petitioner was entitled to a hearing that had some semblance of fairness.

The right, of which petitioner availed himself (Resp. Br. 6) to call witnesses was meaningless when neither petitioner nor his witnesses knew of any charge against him. Their general attestations as to Dr. Zimmerman's loyalty were meaninglessly helpful to him in this setting. So also was the "the right to counsel."

When measured against this court's view in the *Toth* case that the business of the military is to fight or be ready to fight and that the exercise by the military of its martial function is limited to the least possible power adequate to the end proposed, respondent's failure to afford petitioner a reasonable hearing, at some time, which left him other than in the dark, cannot be sustained. Respondent's failure was plainly and simply the unauthorized exercise of judicial power.

A recent decision by the court below, decided subsequent to the filing of the petition here by a different panel from the one which decided the instant case, *Parker v. Lester,* ..... F. 2d ....., No. 14081, Oct. 26, 1955, demonstrates respondent's failure.

The *Parker* case had to do with the Coast Guard screening program, and, like the instant case, was concerned with the problem, both during the Korean War, and since, of sabotage, security and subversive activities. In that case, the court below struck down a program, though "hearings" were required, where, like here, the burden was placed upon the seaman to prove his innocence, and where, like here, he knew "neither the names nor identity of his accusers nor anything else about them" (p. 5, slip opinion). The procedure was precisely that which was used here: "to obtain reports from the F.B.I., or some other governmental investigative agency, which procured statements in some undisclosed form from confidential sources" (p. 13, slip opinion).

The court posed these questions:

> "Whether the danger or possible danger to national security is of such character and magnitude that the ancient and generally accepted rights of notice and hearing envisioned by the Fifth Amendment may be denied to these seamen citizens."

And

> "Is this system of secret informers, whisperers and talebearers of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process?"

The court answered "No," relying upon such decisions of this court as *Morgan v. United States,* 304 U. S. 1; *Kwong Hai Chew v. Colding,* 344 U. S. 590, and recog-

nizing that security and national emergency are involved. The court said (p. 15, slip opinion):

> "What we must balance in the scales here does not involve a choice between any security screening program and the protection of individual seamen. Rather we must weigh against the rights of the individual to the traditional opportunity for notice and hearing, the public need for *a screening system which denies such right to notice and hearing.*" (Italics in orig.)

Measured against this case, we submit, the "hearing" afforded petitioner here simply does not pass the test. Thus, rather than apprize petitioner of what it was that was being held against him, the recorder immediately began [R. T. 186] to ask petitioner a series of questions[2] none of which even once suggested what it was petitioner was suspected of, who said what about him, where derogatory information, if any, was found. In short, petitioner was then, he is now, and so is everybody else, in the dark as to why he was being held and what he was supposed to meet.

The assertion today by respondent (Br. 8, f.n. 7) that "petitioner's actual loyalty is by no means established or conceded" is astounding. One would think that where the right to incarcerate a citizen were in issue, that during a two week, 2300 page, trial, at least something would be offered against petitioner by way of justification. No

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[2]As previously pointed out (Pet. 19, fn. 16) the hearing appears at 4 places in the record. For the convenience of the court, references to it here will be to the Reporter's Transcript R. T. 185-219.

such thing was done. Respondent's counsel's excuse, in the light of the *Endo* case, with which respondent's competent counsel was surely familiar, that petitioner's loyalty was not in issue, is lame indeed. Needless to say, had respondent had even an inkling of circumstances tending to establish that petitioner was disloyal, his counsel would have answered "Yes," instead of "No, sir." when asked by the trial judge as to whether he was "going to contend that the plaintiff here was disloyal" [R. T. 39].

As previously noted (Pet. p. 19, f.n. 16) the transcript of the hearing was a complete record thereof [Freund Dep. 11; R. T. 916]. Yet that record shows that only once was any "evidence" presented to the Board. And the evidence was presented on December 27, 1941 [R. T. 212-214] *after* the Board had made its recommendation that petitioner be interned for the duration [R. T. 211]. Not only was petitioner not present when this evidence was presented [R. T. 211], but an examination of this evidence conclusively demonstrates the utter lack of foundation for the treatment of petitioner. Thus the F.B.I. agent "duly sworn" stated [R. T. 213] that he had the "official Government records" concerning petitioner, and he proceeded to testify as to what they contained:

> that petitioner had an alias, Fritz Kuhn,[3] that he was born in Germany, immigrated to the United States,

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[3]Not even this allegation was communicated to petitioner. When he was being questioned [R. T. 193], he was asked if he knew Fritz Kuhn, or had ever heard of him, or whether any one had called him that. But that was all. Petitioner was never even extended the courtesy of being advised that he was considered to have used an alias, much less to know who said so, or when such a charge appeared. Not even the Warrant of Arrest [Ex. B attached to Hearing; R. T. 219] indicated that any alias was involved.

became a citizen, joined the United States army, opened offices for the practice of his profession, and obtained a diploma [R. T. 214].

This whole procedure took twenty minutes (Hrg. p. 12). How the Board could find any derogatory information from this "evidence" passes the bounds of reason.

But passing over this purported "hearing" in 1941, surely after respondent snatched petitioner away from the courts on the mainland in April 1942, there can be no possible reason for not having at least told petitioner what his incarceration was all about. Respondent concedes (Br. 11, f.n. 12) that thereafter "petitioner's case was reviewed in June 1942." But this "review," perforce, was still based upon the so-called "hearing" of December 1941 and still without petitioner's being given any notice or the slightest gleaning as to why he was being held. Could not petitioner have even been furnished with a letter telling him, even in brief résumé form, what it was that was being held against him? Petitioner surely tried as hard as he could to find out (*Cf.* Pet. Appx. G, pp. 47-49). But not even this modicum of due process was afforded.

In the *Parker* case, the court below required at least a minimum of due process when only the loss of a job was involved. In the instant case, not only was there loss of the opportunity to practice his profession, but petitioner's very liberty was also taken away.

While it is true that the *Toth* case is distinguishable from this case on the facts, yet in principle it is not. Indeed, petitioner's case is even stronger. Petitioner, during none of the time involved, was ever a soldier. Toth at least would get due process if tried by court martial.

Petitioner was not even afforded the minimum due process of trial before a military commission. (*Cf. Ex parte Quirin,* 317 U. S. 1.) Yet respondent would not even trust such a body [Emmons Dep. 20; R. T. 373]. And all this is coupled with the fact that by snatching petitioner from the mainland, respondent would not permit the judicial process to operate.

This court has shown its continued interest in the problem of the "faceless informer" by granting certiorari in *Cole v. Young,* No. 442, 24 Law Week 3155. Certainly the considerations in the instant case are equally substantial.

Conclusion.

In his book, *American Democracy and Military Power,* (University of Chicago Press, 1951) Smith holds that one of the five elements necessary to insure democratic civil controls is that (p. 15) "the courts (be) in a position to hold the military accountable for the protection of the basic democratic rights of the people of the nation." This court in *Ex parte Quirin,* 317 U. S. 1, 19 ("the duty . . . rests on the courts, in time of war as well as in peace, to preserve unimpaired the constitutional safeguards of civil liberty") has said the same thing. Respondent's action here thwarted that principle. Indeed, says Smith (p. 261), the "principal responsibility (of the judicial branch of the government) is that of restraint, lest the military usurp the powers of government or extinguish the liberties of the citizen." And pointing out (p. 278) that it is the duty of the military to strengthen the hand of civil agencies instead of usurping civil authorities, the author said *(ibid.)* "it is the rule . . . for

the military commander to turn over to the civil courts all civilians charged with offenses against the laws." Respondent did just the contrary here, and to an extreme degree.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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